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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 809

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
BUENA VISTA DISTRIBUTION CO., INC.,
METRO-GOLDWYN-MAYER, INC., and
PARAMOUNT FILM DISTRIBUTING CORPORATION,
BLUMENFELD ENTERPRISES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This case does not present any important question of Federal law nor is the decision below in conflict with that of any other circuit.

The district court purported to adopt as a new rule to be applicable in all Federal antitrust cases a portion of section 4 of the 1939 version of the proposed Uniform Contribution Among Tort-Feasors Act to the effect that a general release does not discharge other tort-feasors unless the release expressly provides for their discharge. The court of appeals rejected "the district court's attempt to employ legislation not yet enacted by the Congress" (Appx. A to Pet., p. x); it applied to releases in antitrust cases the rule which is applicable to all releases and which is "consistent with the majority of case law, and the Restatement position" (Appx. A to Pet., p. x).

QUESTION PRESENTED

The question stated by petitioners (Pet., p. 2) is not accurate.

The question presented is the correctness of the rejection by the court of appeals of "the district court's attempt to employ legislation not yet enacted by the Congress" (Appx. A to Pet., p. x) and the holding of the court of appeals

> "* * * that appellees [petitioners] could have reserved rights against other joint tort-feasors * * * but that appellees, with the advice of antitrust counsel, failed to do so. * * * In the absence of such an

express reservation, all joint tort-feasors are released of liability * * *'" (Appx. A to Pet., p. x).

STATEMENT OF THE CASE

Petitioners' statement of the case fails to state all of the consideration for the release which, according to petitioners' president, amounted to $103,200 (R. 298, lines 1-19).[1]

Petitioners' statement of the decisions by the courts below is not complete. The district court attempted to create a new rule of Federal law concerning the effect of releases in Federal antitrust actions (R. 267L). It adopted for such rule a portion of the 1939 version of the proposed Uniform Contribution Among Tort-Feasors Act, 9 Uniform Laws Annotated (1957) 230, 242 (R. 267M).

The Court of Appeals for the Ninth Circuit, on an appeal taken pursuant to section 1292(b) of Title 28 of the United States Code, reversed. It held:

> "In light of the status of the law today, therefore, we are compelled to reject the district court's attempt to employ legislation not yet enacted by the Congress. We hold, consistent with the majority of case law, and the Restatement position, that appellees could have reserved rights against other joint tort-feasors even while releasing Fox West Coast, but that appellees, with the advice of antitrust coun-

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[1] In addition to the $3,200 referred to in the petition (Pet., p. 4), the releasors received consideration worth $100,000 by being permitted to buy for $25,000 a theatre valued at $125,000 (R. 298).

sel, failed to do so. The June release did expressly reserve rights against United Artists, but the August release [here in issue] incorporated no express reservations of any kind'' (Appx. A to Pet., p. x).

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PRESENTS NO CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT COURT OR OF THIS COURT.

In rejecting the trial court's ruling, the court of appeals relied upon subsection 1 of section 885 of the Restatement of Torts and the following cases:

Dura Electric Lamp Co. v. Westinghouse Electric Corp. (3 Cir. 1957) 249 F.2d 5, 6-7;

Combined Bronx Amusements v. Warner Bros. Pictures (S.D.N.Y. 1955) 132 F.Supp. 921, 922;

Rohlfing v. Cat's Paw Rubber Co. (N.D.Ill. 1954) 17 F.R.D. 426, 430;

Michael Rose Productions v. Loew's Incorporated (S.D.N.Y. 1956) 141 F.Supp. 257, 261.

Petitioners point to no decision in any Federal court which conflicts with the decision of the Court of Appeals for the Ninth Circuit and we know of none. Petitioners, however, erroneously assert (Pet., pp. 9-10) that the decision below is inconsistent with this Court's opinion in *Aro Mfg. Co. v. Convertible Top Co.* (1964) 377 U.S. 476.

This Court in the *Aro* case held that alleged tortfeasors, were not discharged by a release which expressly reserved rights against them (377 U.S. 500-501), but also held that payment by the releasee diminishes the amount

recoverable from the alleged tort-feasors against whom rights are reserved (377 U.S. 502-503, 512-513). Neither holding conflicts with the opinion of the court of appeals which followed the uniform rule applied by the Federal courts.

The court of appeals relied upon the *Aro* opinion for its rejection of the old rule that a general release discharges all joint tort-feasors notwithstanding an express reservation of rights against joint tort-feasors (377 U.S. 501). The court of appeals pointed out that, contrary to an assertion by petitioners, this Court in the *Aro* case had *not* disapproved the Restatement position under which a general release discharges all tort-feasors except to the extent that rights are reserved in the release (Appx. A to Pet., p. ix).[2]

For the first time in this case petitioners assert that this Court's opinion in the *Aro* case, when read together with the Restatement position, creates an "incongruity" in the law (Pet., pp. 9-10). The portion of the *Aro* opinion *now* relied upon by petitioners (377 U.S. 502-503, 512-513) does not relate to the release of joint tort-feasors; it relates only to the amount of damages which may be recovered from those joint tort-feasors not released. This Court held, in accordance with subsection 3 of section 885 of the Restatement of Torts, that payment made by one tort-feasor diminishes the amount recoverable from other

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[2]Petitioners now note that this Court in the *Aro* case cited Professor Prosser and compare its three citations of Prosser to only one citation of the Restatement (Pet., p. 14). But both the Restatement and Prosser were cited by this Court for one point only: disapproval of the rule that an express reservation in a release has no effect (377 U.S. 500-501).

tort-feasors and that a reservation of rights is immaterial if in fact full compensation has been received.[3]

This Court in the *Aro* opinion did not find any inconsistency or incongruity in the rules embodied in subsections 1 and 3 of section 885 of the Restatement of Torts. Petitioners have cited no authority which discerns any such incongruity and we know of none. The rules embodied in the two subsections are wholly consistent and taken together operate (a) to discharge a plaintiff's claim against an alleged tort-feasor in the event a general release is given one joint tort-feasor and no claims against the other tort-feasors are reserved (subsection 1), and (b) to diminish the amount that a plaintiff can recover from an alleged tort-feasor by the amount of compensation that has in fact been received from a joint tort-feasor (subsection 3).[4]

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[3]Subsection 3 of section 885 of the Restatement of Torts provides:

> "Payments made by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment; the extent of the diminution is the amount of the payment made, or a greater amount if so agreed between the payor and the injured person."

[4]As this Court pointed out in the portion of the *Aro* case quoted by petitioners (Pet., p. 9), for the purpose of determining the amount of diminution in plaintiff's recovery "the adequacy of compensation must always be a question of fact" (377 U.S. 513). This is in accord with the established principle of contract law that a written recital of consideration is not conclusive proof of the amount actually paid (Rest. Contracts, sec. 82).

II. THE COURT OF APPEALS CORRECTLY REFUSED TO AFFIRM THE RULE ADOPTED BY THE DISTRICT COURT, AND PETITIONERS HAVE NOT PRESENTED ANY REASON WHY THIS DETERMINATION SHOULD BE DISTURBED.

Petitioners, tacitly agreeing that the court of appeals correctly rejected the rule adopted by the district court, do not attempt to support that rule. Instead, they propose a new rule that the effect of a release on an alleged joint tort-feasor should be determined by an examination into the unexpressed and subjective intent of the releasor to reserve or not to reserve claims against joint tort-feasors (Pet., p. 16)—a rule which apparently has not been adopted by any Federal court or by any legislature and which was not presented to the court below for its consideration.[5] They urge this Court to adopt their proposed rule on the grounds that (1) it would remove the purported "incongruity" created by the *Aro* decision (Pet., pp. 9-10), and (2) the decision of the court of appeals ignored "modern day commercial reality" (Pet., pp. 10-13). We have previously shown that there is no incon-

[5]The court of appeals, from reading the briefs before it, found "three possible rules of law which might conceivably be applied to the question of what effect should be given to a general release to one of several joint tort-feasors" (Appx. A to Pet., p. v). The rule now advanced by petitioners is entirely different from any rules set forth in the opinion (Appx. A to Pet., p. vi; see also Pet., p. 14). It was at most obliquely raised by petitioners' citation of cases from the Second Circuit which dealt with what claims—rather than which parties—were released by a general release of one tort-feasor (Appx. A to Pet., pp. viii-ix). Petitioners did not petition for a rehearing. Nor did they otherwise comply with the requirement that the position now taken in their petition be pressed upon the attention of the court of appeals.

Jordan Mining Co. v. Société Des Mines (1896) 164 U.S. 261, 264-265;
Duignan v. United States (1927) 274 U.S. 195, 200;
Husty v. United States (1931) 282 U.S. 694, 701-702.

sistency or incongruity between the *Aro* decision and the decision of the court of appeals (supra, pp. 4-6).

The assertion that the court of appeals has ignored "commercial reality" finds no support in the record of this case or in common experience. There is no basis for petitioners' assertion that antitrust plaintiffs either lack counsel or have inadequate counsel (Pet., p. 12). In this case, petitioners were at all times, including the approval and signing of the release, represented by counsel well versed in antitrust law and Federal procedure (Appx. A to Pet., p. x; cf. *Dura Electric Lamp Co. v. Westinghouse Electric Corp.* (3 Cir. 1957) 249 F.2d 5, 7).

Petitioners hypothesize about "unwary" laymen upon whom "able defense lawyers" will "spring the trap" (Pet., pp. 12-13, 17). But the law already provides relief in cases where a release is obtained as a result of basic mistake, fraud or duress (Rest. Torts, sec. 885, Comment (d), pp. 462-463). There is no allegation of such circumstances in this case. Moreover, the assertion that antitrust plaintiffs are generally at a legal disadvantage to antitrust defendants is simply petitioners' unsupported and undocumented conclusion.[6]

Petitioners' repetition of the district court's speculation about what an antitrust plaintiff "usually intends" (Pet., p. 13) is likewise without factual or other support. On the contrary, it can more fairly be concluded that a plaintiff intends that the release he signs be in accord with

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[6]The suggestion (Pet., pp. 12-13) that counsel for possible antitrust defendants will seek out possible plaintiffs and suggest settlements before actions are brought and before the potential plaintiffs are represented by counsel borders on the absurd.

the established rule that rights against others must be reserved. For example, as the court below pointed out, in the case at bar the releasors first signed a release which reserved rights against defendant United Artists, but later executed a release which contained no express reservations of any kind (Appx. A to Pet., p. x). The court further noted that these actions were taken "with the advice of antitrust counsel" (Appx. A to Pet., p. x). There is, therefore, no basis in the record of this case for speculation regarding intent. And, once more, petitioners present no documentation to support their assertions.

Petitioners also assert that enforcement of the antitrust laws through private action will be "seriously undermined" in the event that this Court fails to adopt the new rule which they propose (Pet., p. 17). But petitioners ignore the most likely result which would follow the adoption of their proposal: They assert that most antitrust actions are settled and seemingly acknowledge the importance of encouraging such settlements (Pet., pp. 11-12). Further, they admit that the decision of the court of appeals will eliminate disputes over the effect of a release (Pet., p. 10). But the rule petitioners now advance would allow the releasor, in every case, to dispute the intended effect of his release. This could only create uncertainty and, therefore, discourage the settlement of antitrust cases.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 4, 1966.

Respectfully submitted,

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